

Federal Court



Cour fédérale

**Date: 20240617**

**Docket: T-125-23**

**Citation: 2024 FC 918**

**Toronto, Ontario, June 17, 2024**

**PRESENT: Justice Andrew D. Little**

**BETWEEN:**

**MINISTER OF PUBLIC SERVICES AND  
PROCUREMENT**

**Applicant**

**and**

**INFORMATION COMMISSIONER OF  
CANADA and MARILYN MILLER**

**Respondent**

**JUDGMENT AND REASONS**

[1] The Information Commissioner of Canada ordered the applicant, the Minister responsible for Public Services and Procurement Canada (“PSPC”), to retrieve certain records so that copies may be provided to Marilyn Miller under the *Access to Information Act*, RSC 1985, c A-1 (the “Act”). PSPC now asks the Court to declare that it is not required to comply with the Commissioner’s order.

[2] The central issue is whether the records are “under the control” of PSPC. PSPC advised that it did not have physical possession of the records. They are in the possession of a private sector corporation that PSPC contracted to manage federal government properties for which PSPC is responsible. The records relate to a subcontract between that corporation and another party to do work at a PSPC-owned building.

[3] For the reasons below, I conclude that the application must be dismissed because the records at issue are “under the control” of PSPC. PSPC will be ordered to take steps to obtain the requested records and process them in accordance with the Act. The Commissioner’s order will be varied slightly.

**I. Background and Events Leading to this Application**

A. *The Parties*

[4] The applicant is the Minister of Public Services and Procurement. I will refer to the applicant as PSPC unless the context requires otherwise. PSPC has responsibilities described in the *Department of Public Works and Government Services Act*, SC 1996, c 16. They include all matters relating to the construction, maintenance and repair of public works and federal real property, and the provision of accommodation and other facilities for federal government departments.

[5] The respondents are the federal Information Commissioner of Canada (the “Commissioner”) and Ms Marilyn Miller, who made the request for the records under the Act.

The office of the Commissioner is responsible for investigating complaints, preparing reports and making orders in relation to access to information requests under the Act.

B. *The Access to Information Request*

[6] In 2006, Ms Miller began to work for Health Canada at the Health Protection Building located at 200 Tunney's Pasture Driveway in Ottawa (the "Health Protection Building"). She became chronically ill, took a long-term disability leave and eventually medically retired.

[7] On July 9, 2020, Ms Miller filed a request under the Act (the "Request") that PSPC provide her with a copy of "all designated substance reports" for the Health Protection Building. She identified nine documents related to a contract "awarded to DST Consulting Engineers Inc. on April 7, 2017, under PSPC Contract Number PWG 560229-1".

[8] The nine requested documents are below as described in the Request, with numbers added by the parties during this litigation for ease of reference:

PSPC Documents Related to this Contract Being Approved  
IAR [Investment Analysis Review] [#1]  
Statement of Requirement [#2]

BID DOCUMENTS

Addendum 1.pdf, uploaded Date Mar 1, 2017 [#3]  
Addendum 2.pdf, uploaded Date Mar 7, 2017 [#4]

RFP DOCUMENTS

Attachment No. 7-Designated Substance Report 1.pdf, Uploaded 2017-02-21 [#5]  
Attachment No. 8-Designated Substance Report 2.pdf, Uploaded 2017-02-21 [#6]  
Section B Scope of Work [#7]

DST Consulting Engineers Inc. Completed Stipulated Bid Document  
Appendix F Supplementary Conditions [#8]

DST Consulting Engineers Inc. SUBMITTED FINAL CONTRACT REPORT  
Final Investigate & Report (I&R) including lab analysis reports, photos,  
diagrams [#9]

[9] The internal PSPC Access to Information and Privacy Unit (the “ATIP Unit”) identified two contracts relevant to Ms Miller’s Request:

- a) On May 29, 2013, the Minister entered into a multi-year contract (the “Main Contract”) with Brookfield Global Integrated Services Inc. (“BGIS”). The Main Contract provided, among other things, that BGIS would provide real property services, property management services, project delivery services, and optional services at the Carling and Tunney’s Pasture campuses in the National Capital Region.
- b) On April 7, 2017, BGIS entered into a subcontract (the “Subcontract”) with DST Consulting Engineers Inc. to perform a designated substances and hazardous materials survey.

[10] By letter dated October 2, 2020, a manager in PSPC’s ATIP Unit answered the Request. The letter enclosed a copy of “all the accessible documents” requested under the Act but specified that “certain information has been severed as it qualifie[d] for exemption and exclusion under subsection 19(1) of the Act”. With respect to the nine documents requested by Ms Miller:

- a) The letter advised that documents #1 and #2 had previously been provided to Ms Miller. They are not at issue in this proceeding.

- b) The letter did not enclose documents #3 to #8. Those records are at issue in this proceeding.
- c) For document #9, the letter enclosed a document entitled “Designated Substances and Hazardous Materials Update Summary Report, Health Protection Building, 200 Tunney’s Pasture Driveway, Ottawa, Ontario” dated November 20, 2018. In this application, Ms Miller submitted that this document was not responsive to her Request and that document #9 was not disclosed.

C. *Reports and Order of the Information Commissioner*

[11] Ms Miller submitted a complaint dated November 5, 2020, to the Commissioner under section 30 of the Act. The Commissioner conducted an investigation.

[12] On October 3, 2022, the Commissioner issued an initial report under subsection 37(1) of the Act. It concluded that the complaint was well-founded.

[13] The Commissioner’s initial report advised that the Commissioner intended to order PSPC to retrieve all of the requested records and to respond to Ms Miller’s request in accordance with the Act. The Commissioner determined that all of the requested records were under the control of PSPC. The analysis in the Commissioner’s initial report was substantially similar to the final report, discussed immediately below. The Commissioner’s initial report asked that PSPC advise by October 28, 2022, whether it planned to implement the Commissioner’s order.

[14] On October 20, 2022, PSPC's Assistant Deputy Minister, Policy, Planning and Communications notified the Commissioner that in PSPC's view, the contract between PSPC and BGIS did not give rise to a right of production of documents associated with subcontracts.

[15] On November 8, 2022, the Commissioner issued a final report and order under subsection 37(2) of the Act. The final report and order required PSPC to retrieve the requested records and respond to Ms Miller's access request by processing the records in accordance with the Act and giving her access to them in their entirety, unless they were withheld on the basis of a specified exemption in the Act.

[16] The Commissioner's final report described Ms Miller's complaint as alleging that PSPC "failed to conduct a reasonable search for records in response to an access [request] made under the [Act] for the Health Protection Building (Tunney's Pasture) Whole Building Designated Substances Report". The final report stated that Ms Miller's requested contract documents related to a subcontract awarded to DST Consulting Engineers, Inc., by BGIS on April 7, 2017.

[17] To determine whether PSPC conducted a reasonable search for the records not provided (documents #3 to #8 above), the Commissioner considered two questions:

1. Whether PSPC had control of the records at issue; and
2. Whether PSPC's search for records responsive to the request under its control was reasonable.

[18] The Commissioner noted that the Act provided requesters with a right of access to records that are "under the control" of government institutions. Recognizing that "under the control" is not defined in the Act, the Commissioner's final report found that courts have

affirmed that this phrase should be interpreted broadly and liberally in order to make the right of access meaningful (citing *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 SCR 306; *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)*, 2018 ONCA 559). The final report stressed that whether records are “under the control” of an institution must be assessed on a case-by-case basis and that physical possession of records is not determinative of control.

[19] Based on *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, the Commissioner applied a two-step legal test for whether records are “under the control” of a government institution when the records are not in the physical possession of the institution. See *National Defence*, at paras 54-56.

[20] The Commissioner concluded that the records at issue related to an institutional or departmental matter. The Commissioner found that:

- The records at issue related to a departmental matter and existed because of PSPC’s contract with BGIS;
- The records at issue were subcontract documents related to BGIS awarding a subcontract awarded to DST Consulting Engineers, in response to BGIS’s contractual obligations towards PSPC;
- PSPC’s position “attempt[ed] to minimize the link between PSPC and the records at issue despite significant indications to the contrary”; and
- The responsibility for the management of the government building in question ultimately lay with PSPC. PSPC was the “designated custodian of general-purpose office accommodation in Canada”.

[21] The Commissioner also concluded that a senior PSPC official should reasonably expect to obtain the records at issue upon request to BGIS. The Commissioner found that:

- The substantive content of the records at issue (subcontract documents) and the circumstances in which they were created, were defined by the Main Contract between PSPC and BGIS.
- The legal relationship between the government institution, PSPC, and the record holder, BGIS, was a contractual relationship for the management of PSPC buildings. PSPC had control over BGIS's subcontract documents through its "legally enforceable right" to obtain the records at issue.
- The contract between PSPC and BGIS contained mechanisms for PSPC to obtain records related to "subcontracting and inquiries concerning the awarding of subcontracts".
- Under the Main Contract, BGIS was required to provide the Technical Authority (who are PSPC employees) with full information and assistance so the Technical Authority may verify, assess or determine that the work is executed in accordance with the Main Contract.
- PSPC conceded that it can obtain records of the type at issue if required for a court case.
- Other provisions in the Main Contract further supported PSPC's "legally enforceable right of access to the records" and indicated PSPC's authority to "regulate or control the use or disposition of the records at issue, and/or its authority over the communication of the records at issue".

[22] The final report noted that PSPC failed to engage with the Commissioner's preliminary analysis of various relevant factors that grounded the conclusion that PSPC had control of the records at issue.

[23] The Commissioner further concluded that PSPC had not yet conducted a reasonable search for the records at issue.

[24] The final report advised that a determination that records are under the control of an institution does not necessarily mean that they must be disclosed, but rather that the records must be retrieved and processed in accordance with the Act.



[25] The Commissioner concluded that the complaint was well-founded and ordered PSPC:

- a) to retrieve the records at issue from BGIS (or DST Consulting Engineers) that the Commissioner determined to be under the control of PSPC, specifically documents #3 to #8; and
- b) to respond to the “access request by processing the records at issue in accordance with the Act by giving access to them in their entirety, unless they are withheld in whole or in part on the basis of specified provisions in the Act”.

[26] The Commissioner’s final report treated document #9 as though it had been provided to Ms Miller.

[27] The Commissioner noted that the Minister was not implementing the Commissioner’s order. The final report indicated that if the Minister did not plan to implement the Commissioner’s order, the Minister must apply to the Federal Court for a review.

[28] On January 16, 2023, the Minister commenced the present application.

## II. The Application to this Court

[29] PSPC commenced this application under subsection 41(2) of the Act, which provides:

**Review by Federal Court –  
government institution**

41 (2) The head of a government institution who receives a report under subsection 37(2) may, within 30 business days after the day on which they receive it, apply to the Court for a review of any matter that is the subject of an order set out in the report.

[...]

**Révision par la Cour  
fédérale : institution  
fédérale**

41 (2) Le responsable d'une institution fédérale qui reçoit le compte rendu en application du paragraphe 37(2) peut, dans les trente jours ouvrables suivant la réception du compte rendu, exercer devant la Cour un recours en révision de toute question dont traite l'ordonnance contenue dans le compte rendu.

[...]

[30] Ms Miller gave notice that she intended to appear in this proceeding under subsection 41.2(2) of the Act. On October 6, 2023, Associate Judge Duchesne issued an order adding Ms Miller as a respondent in the proceeding.

[31] Subsection 41.2(2) provides that if a complainant provides notice under that provision, “they may raise for determination by the Court any matter in respect of which they may make an application under section 41”. In this proceeding, Ms Miller took the position that PSPC had not provided document #9 to her. Neither the applicant nor the Commissioner contested that she had the right to do so. Although neither one said so expressly, I assume that because document #9

was explicitly raised in her complaint, her position in this proceeding may be raised under subsection 41(1) as a matter that was “the subject of [her] complaint”.

[32] Section 44.1 of the Act provides:

***De novo review***

44.1 For greater certainty, an application under section 41 or 44 is to be heard and determined as a new proceeding.

[...]

***Révision de novo***

44.1 Il est entendu que les recours prévus aux articles 41 et 44 sont entendus et jugés comme une nouvelle affaire.

[...]

[33] I agree with all parties that this application is a *de novo* hearing, not a judicial review of the Commissioner’s decision as set out in the final report and order. The Court conducts an independent assessment of the evidence and determines the matter afresh. The Court is in the same position as a trial judge who makes findings of fact and applies the law to those facts:

*Fraser v. Canada (Public Safety and Emergency Preparedness)*, 2023 FCA 167, at paras 33-35, 39, 44; see also *Canada (Information Commissioner) v. Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1279, at para 38. The Court does not apply the deferential framework set out in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 SCR 563.

### **III. Issues**

[34] The central questions in this proceeding are as follows:

1. Are Documents #3 to #8 “under the control” of PSPC under subsection 4(1) of the Act?
2. Should the Court also order PSPC to retrieve document #9 from BGIS?

[35] The parties raised a number of subsidiary issues in their submissions, including the admissibility of a statement in an affidavit of a former PSPC employee (which the Commissioner argued was inadmissible opinion evidence), and the admissibility or weight to be given to evidence about PSPC’s efforts to locate certain records, which was provided on information and belief in this application.

#### **IV. Analysis**

##### *A. The evidence on this application*

[36] All three parties filed affidavit evidence.

[37] The applicant filed two affidavits of Shawn Gardner, a past Senior Director at PSPC and current casual employee at PSPC. His affidavits described PSPC’s response to Ms Miller’s Request and attached certain documents including a copy of the Main Contract. The respondents cross-examined Mr Gardner on his affidavits. In response to a Direction to Attend for cross-examination, Mr Gardner provided a package of documents that was marked as an exhibit at his cross-examination.

[38] PSPC also filed an affidavit of Lyne Roy, a senior Director in PSPC’s ATIP Unit. It described a sequence of internal events following receipt of the Request up to the commencement of this application. The Commissioner cross-examined Ms Roy on her affidavit.

In response to a Direction to Attend for cross-examination, Ms Roy provided a package of documents, which was marked as an exhibit at her cross-examination.

[39] The Commissioner filed the affidavit of Rachel Laurin, Senior Director of Investigations with the Commissioner's office. Her affidavit described the Commissioner's investigation and attached relevant documents such as the Commissioner's interim and final reports and PSPC's submissions during the investigation. Ms Laurin was not cross-examined on her affidavit.

[40] Ms Miller filed an affidavit that described her Request and attached the documents she received from PSPS in response to it, her complaint to the Commissioner and the reports she received from the Commissioner's office. PSPC cross-examined Ms Miller on her affidavit. In response to a Direction to Attend for cross-examination, Ms Miller provided a package of documents, which was marked as an exhibit at her cross-examination.

B. *Statutory Provisions*

[41] Since June 2019, Parliament has expressed the purpose of the Act as follows:

**2 (1)** The purpose of this Act is to enhance the accountability and transparency of federal institutions in order to promote an open and democratic society and to enable public debate on the conduct of those institutions.

**2 (1)** La présente loi a pour objet d'accroître la responsabilité et la transparence des institutions de l'État afin de favoriser une société ouverte et démocratique et de permettre le débat public sur la conduite de ces institutions.

See *An Act to amend the Access to Information Act and the Privacy Act and to make consequential amendments to other Acts*, S.C. 2019, c. 18, section 2.

[42] In *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2024 SCC 4, a case about the Ontario access to information statute, the Supreme Court stated at paragraph 2:

Access to information promotes transparency, accountability, and meaningful public participation. Without adequate knowledge of what is going on, legislators and the public can neither hold government to account nor meaningfully contribute to decision making, policy formation, and law making. In this way, FOI [Freedom of Information] legislation is intended not to hinder government but to “improve the workings of government” by making it “more effective, responsive and accountable” to both the legislative branch and the public (*Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at para. 63).

[43] Subsection 4(1) of the Act is central to this proceeding:

**Right to access records**

4 (1) Subject to this Part, but notwithstanding any other Act of Parliament, every person who is

- (a) a Canadian citizen, or
- (b) a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*,

**Droit d'accès**

4 (1) Sous réserve des autres dispositions de la présente partie mais nonobstant toute autre loi fédérale, ont droit à l'accès aux documents relevant d'une institution fédérale et peuvent se les faire communiquer sur demande:

- a) les citoyens canadiens;
- b) les résidents permanents au sens du paragraphe 2(1) de la *Loi sur l'immigration et la protection des réfugiés*.

has a right to and shall, on request, be given access to any record under the control of a government institution.

[Soulignement ajouté.]

[Emphasis added.]

[44] Section 3 of the Act defines “government institution” as any department or ministry of state of the Government of Canada, or any body or office, listed in Schedule I of the Act and any parent Crown corporation, and any wholly-owned subsidiary of such a corporation, within the meaning of section 83 of the *Financial Administration Act*, RSC 1985, c F-11. It is not doubted that PSPC is a “government institution”.

[45] However, the Act does not define or explain the phrase “under the control of” in subsection 4(1).

C. *The legal test for “... under the control ...” of a government institution under subsection 4(1) of the Act*

[46] All parties made their submissions on the merits of this application based on the Supreme Court’s reasons in *Canada (Information Commissioner) v. Canada (Minister of National Defence)*. That appeal concerned four applications by the Information Commissioner relating to refusals to disclose records under the Act. Three applications concerned refusals to disclose records in ministerial offices of the Prime Minister, Minister of Defence and Minister of Transport. Central to the Court’s analysis on these three applications were the meanings of “government institution” and “control” under subsection 4(1) of the Act. The fourth application related to records of the Prime Minister’s agenda in the possession of the Privy Council Office and the Royal Canadian Mounted Police. See *National Defence*, at paras 1-3, 8.

[47] The Supreme Court found that the three ministerial offices were not a “government institution” under subsection 4(1). The Court affirmed a two-step test for determining whether a requested record held within a ministerial office was “under the control” of its related “government institution” (i.e., the three government departments corresponding to each minister) under subsection 4(1).

[48] The Supreme Court held that the notion of “control” must be given a broad and liberal meaning in order to create a meaningful right of access to government information: *National Defence*, at para 54. The Court stressed that physical control or possession over a document will play a leading role in any access to information case but is not determinative of the issue of control. A document being located in a Minister’s office did not end the inquiry of whether the document is under the control of a government institution. Rather, this is the point at which a two-step inquiry commences.

[49] The Court held that where the documents requested are not in the physical possession of the government institution, the inquiry proceeds in two steps:

- 1) Step one acts as a screening device. It asks whether the record relates to a departmental matter: *National Defence*, at para 55. If it does not, that ends the inquiry because the Act is not intended to capture non-departmental matters in the possession of Ministers of the Crown. If the record requested relates to a departmental matter, the inquiry into control continues.
- 2) Step two considers “*all* relevant factors ... to determine whether the government institution could reasonably expect to obtain a copy [of the record] upon request”:



*National Defence*, at para 56 [original italics]. These factors include the substantive content of the record, the circumstances in which it was created, and the legal relationship between the government institution and the record holder. The reasonable expectation test is objective. If a senior official of the government institution, based on all relevant factors, reasonably should be able to obtain a copy of the record, the test is made out and the record must be disclosed, unless it is subject to any specific statutory exemption. In applying the test, the word “could” is to be understood accordingly.

[50] The Supreme Court unanimously agreed that the fact that Ministers’ offices were separate and different from government institutions did not mean that a government institution cannot control a record that is not in its premises. If a government institution controls a record in a Minister’s office, the record falls within the scope of the Act. If it falls within the scope of the Act, the head of the government institution must facilitate access to it on the basis of the procedure and the limits specified in the Act. Conversely, if a document is under the control of the Minister’s office and not under the control of the related, or any other government institution, it does not fall within the purview of the Act. See *National Defence*, at paras 57-58.

[51] As noted, the parties in this proceeding agreed that this test was the appropriate test to apply and did not propose any changes to it to address the different factual scenario arising in the present case. They also acknowledged that a record could be in physical possession of one party and “under the control” of another. The parties emphasized different aspects of the two-step

analysis in *National Defence* to support their positions. All parties made submissions on the impact of the terms of the Main Contract.

D. *Nature of the Records in Ms Miller's Request*

[52] The records identified in Ms Miller's Request concerned designated substance reports for a federal building in which government employees carried out their work. The specified documents related to the Subcontract by BGIS awarded to DST Consulting Engineers in April 2017.

[53] The first two of the nine documents described in Ms Miller's Request have been produced to her. Copies were in the record on this application and Mr Gardner described them in his first affidavit. Document #1 is an Investment Analysis Report prepared by PSPC. It recommended the demolition of the Health Protection Building. Document #2 is a Statement of Requirements related to the work required for the demolition project at the Health Protection Building and preparing the site for future development. A Project Manager Consultant at PSPC authored document #2. It contains approvals and the signatures of PSPC officials in August 2016.

[54] Mr Gardner's affidavit identified a number of steps that were required to advance the project and objectives in documents #1 and #2, including updating the designated substances report prior to demolition.

[55] Document #9 in the Request was the SUBMITTED FINAL CONTRACT REPORT by DST Consulting Engineers and described as the “Final Investigat[ion] and Report” including lab analysis, photos, diagrams. In response to this request, PSPC provided a document in its possession to Ms Miller that was on the letterhead of DST Consulting Engineers dated November 20, 2018. Its subject is “Designated Substances and Hazardous Materials Update Summary Report” for the Health Protection Building. Its first paragraph advises that BGIS retained DST Consulting Engineers to perform an “update pre-demolition designated substances and hazardous substances survey” at that building.

[56] Of the remaining six documents in the Request (#3 to #8), three are general bid documents (two addenda and a scope of work); two are designated substance reports used in the RFP process; and one is from DST Consulting Engineers’s completed bid (supplementary conditions).

[57] The applicant acknowledged during oral submissions that the two designated substance reports in the Request (documents #5-#6) likely predated BGIS’s contract solicitation process and may well be in PSPC’s possession but argued that PSPC could not identify them because the Request did not provide a date. The applicant maintained that Ms Miller could always file another request for them under the Act.

E. *Are documents #3 to #8 “under the control” of PSPC?*

[58] The applicant’s position was that PSPC does not have control of the records at issue. PSPC did not create the records, did not have physical possession of them and was not aware of

their contents. PSPC has not seen the records. PSPC is not a party to the Subcontract and has no legal relationship with the subcontractor, DST Consulting Engineers.

[59] The applicant submitted that the records at issue do not relate to a departmental matter, but instead relate to a private sector solicitation process (starting with a “request for quote”) that resulted in an agreement between two private sector companies, BGIS and DST Consulting Engineers. PSPC was not involved in the solicitation process, including the decision to subcontract some of the work under the Main Contract. PSPC did not approve or vet the subcontractor and only approved (earmarked) funding for the subcontracted work. PSPC has no contractual privity with DST Consulting Engineers. The applicant referred to Mr Gardner’s evidence, which described PSPC’s role as owning federal real property that is managed by BGIS and provided his views, after his many years at PSPC, about how contractual provisions are and are not used to obtain information (and by whom).

[60] The Commissioner’s position was that the records at issue were “under the control” of PSPC for the purposes of subsection 4(1) of the Act, applying the two-step analysis in *National Defence*. The Commissioner argued that, unlike the records in *National Defence* which distinguished ministerial activities from departmental activities, the records at issue do not engage with the head of a government institution’s non-departmental activities. The Commissioner argued that the words “relate to” in the first stage of the *National Defence* test should be understood as requiring the records at issue to have a “connection or association with” a departmental matter (citing *Canada (Information Commissioner) v. Royal Canadian Mounted Police Commissioner*, 2003 SCC 8, at para 25). In this case, the records at issue have a clear

connection or association with PSPC's mandate, operations, and functions which include maintaining and repairing "public works [and] federal real property" and providing departments with "services related to architectural or engineering matters affecting any public work, federal real property": *Department of Public Works and Government Services Act*, subsections 6(c), 6(h).

[61] Ms Miller's position was that BGIS's decision to subcontract cannot be severed from the purpose of the Subcontract or the work to which the Subcontract relates, which were inherently departmental matters. Ms Miller referred to the Ontario Divisional Court's recent decision in *YUDC v. Information and Privacy Commissioner*, 2022 ONSC 1755, which dismissed an application for judicial review of a decision by the Ontario Information and Privacy Commissioner (*York University (Re)*, 2020 CanLII 15337 (ON IPC)).

[62] At stage two of the *National Defence* analysis, all parties made detailed submissions about the scope and applicability of many specific terms in the Main Contract. In general, the applicant argued that the Main Contract did not give PSPC the legal right to the records at issue, and in any event any right to obtain records was limited by the requirement to exercise contractual discretion in good faith (citing *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7, [2021] 1 SCR 32). The Commissioner and Ms Miller both made extensive submissions about the terms of the Main Contract that give PSPC enforceable legal rights to obtain information and documents.

[63] As I will explain, not all of documents #3 to #8 are only in BGIS's possession. As the applicant properly recognized, documents #5 and #6 are also likely in the possession of PSPC. I will carry out the two-step analysis in *National Defence* and discuss documents #5 and #6 at the appropriate moment.

(1) Step One: The records relate to a departmental matter

[64] I agree with the respondents that documents #3 to #8 relate to a departmental matter.

[65] First, under the *Department of Public Works and Government Services Act*, PSPC is responsible for "all matters ... relating to ... the construction, maintenance and repair of public works, federal real property and federal immovables", the "provision of accommodation and other facilities for departments" and the "provision to departments of advice on or services related to architectural or engineering matters affecting any public work, federal real property or federal immovable": see paragraphs 6(e), (f) and (h). See also paragraphs 15(f) and (g).

[66] Second, the Main Contract gave BGIS the overarching contractual authority to conduct work related to real property of the federal government for which PSPC was responsible. BGIS entered into the Subcontract for some work related to one specific federal real property, the Health Protection Building. DST Consulting Engineers's letter dated November 20, 2018, produced as document #9 to Ms Miller by PSPC in response to her Request, resulted from the Subcontract and confirmed that DST Consulting Engineers performed an "update pre-demolition designated substances and hazardous substances survey" – effectively an updated designated

substances report for the building. Page two of that letter lists five prior designated substance reports related to the Health Protection Building dating from 2004 to February 2016.

[67] Third, the fact that PSPC has entered into the Main Contract with BGIS for certain services, including services related to the Health Protection Building, does not end the analysis of whether the records are “under the control” of PSPC for subsection 4(1) of the Act. That is true in law (*National Defence*, at paras 54, 60) as the parties acknowledged, and as a matter of fact and contractual agreement in this case.

[68] The Main Contract concerns property management, project delivery and optional services related to specified federal government properties, to be provided by BGIS. While Mr Gardner characterized PSPC’s focus on “strategic ownership responsibilities”, its role is described in the Main Contract (section 5.1.1) in more detail. Its broad responsibilities were stated to be as manager of one of the largest and most diverse portfolios of real estate in Canada, and providing federal government departments and organizations with affordable, productive work environments and a full range of optional, fee-for-service real property services to support the government’s delivery of services to Canadians. Its stated strategy is to leverage the private sector and develop delivery mechanisms for services to “enable effective out-tasking”. It manages the services delivered by private sector service providers. It “has a responsibility to maintain property management and project delivery services for all tenants [government departments and third party organizations occupying real property and space], as well as sustainably managing the assets throughout their life-cycle[s]”.

[69] BGIS's responsibilities under the Main Contract are described in the Statement of Work, starting at section 5.2.1. Section 5.2.2.2 notes that Canada (i.e., PSPC) regards the use of the private sector for the delivery of property management services and project delivery services as a "long-term business relationship in which the parties work together in an environment of mutual respect and trust". Canada requires BGIS to establish close business and operational ties to PSPC (section 5.2.2.4).

[70] It is apparent that the terms of the Main Contract engage BGIS to implement some aspects of the broad statutory responsibilities assigned to PSPC under the *Department of Public Works and Government Services Act*. In other words, its work under the Main Contract relates to departmental matters for the purposes of stage one of the *National Defence* analysis – work that would be done by PSPC (with documents it created being subject to the Act), absent its policy to contract that work to the private sector.

[71] The Main Contract also contains a provision (section 2.44) that expressly addresses access to information requests under the Act for records created by BGIS. It states in part:

Records created by the Contractor [BGIS], and under the control of Canada [PSPC], are subject to the *Access to Information Act*. The Contractor acknowledges the responsibilities of Canada under the *Access to Information Act* and must, to the extent possible, assist Canada in discharging these responsibilities...

[72] This provision is relevant to both stages of the *National Defence* analysis. At this stage, it implicitly recognizes that some records created by BGIS will be related to department matters.



[73] Fourth, the Main Contract contemplates that BGIS will enter into subcontracts for some of the Work. Section 2.6 is entitled “Subcontracts”. It provides that BGIS must obtain written consent before subcontracting (from the Contracting Authority, which is PSPC for present purposes), except in certain circumstances. One such circumstance, noted by the applicant, is that BGIS may without consent subcontract any portion of the work “as is customary in the carrying out of similar contracts”: section 2.6.2.b. The parties made submissions on whether this provision applied (and what was “customary”, on which there was no expert opinion evidence). The Main Contract has requirements for contractual terms (section 2.6.3) and BGIS remains responsible for subcontracted work (section 2.6.4). There are detailed provisions about the management of the subcontracting process (section 5.6.5). These various provisions support the view that subcontracted work can relate to a departmental matter.

[74] Fifth, PSPC was aware of and involved at points in the process leading to the Subcontract between BGIS and DST Consulting Engineers.

[75] The applicant sought to minimize PSPC’s role and relied on Mr Gardner’s evidence relating to section 2.6.2 that PSPC did not expect to approve the Subcontract. Although the Information Commissioner argued otherwise, I find Mr Gardner’s evidence about section 2.6.2 is admissible. His affidavit stated that BGIS “was not expected to seek approval [from PSPC] in order to subcontract part of the work”, which I read as implicitly providing PSPC’s view on whether BGIS needed to seek approval to subcontract. The evidence is not (and does not purport to be) an independent opinion offered by Mr Gardner to the Court on the proper interpretation of

the provision. I take it as PSPC's view or position, informed by Mr Gardner's long experience working there.

[76] Documents in the record show that BGIS was not entirely independent in its subcontracting process. The terms of the Main Contract also require that BGIS run a competitive process for subcontracts and have some substantive requirements for the process: see sections 5.6.5.5 and 5.6.5.6.

[77] The Main Contract contemplates that BGIS may carry out optional project delivery related services of Category III Projects, which are valued in excess of \$1 million: see sections 5.5.1.1 to 5.5.1.3, and section 5.5.4. Relevant to the present analysis, one such project was the Subcontract related to the demolition of the Health Protection Building. The evidence shows that five employees of PSPC recommended funding for planning work for that demolition in September 2016 with a total value of approximately \$3,843,000 before taxes. In September 2016, PSPC and BGIS executed a "Work Authorization for Optional Project Delivery Related Services – Projects over \$1,000,000" for that work, including the contract solicitation process that resulted in the engagement of DST Consulting Engineers. The Work Authorization stated on its face that it related to the Health Protection Building; the stated contract number also matches the Main Contract and refers to that building, with PSPC as the "custodian". The Work Authorization stated at page 2: "Through this [Work Authorization], BGIS will engage consultants to conduct a feasibility study and an environmental assessment to prepare for the demolition of the Health Protection Building ..." The work authorization also expressly referred to tender documents and tender services, consistent with certain contractual requirements for

subcontracting under the Main Contract. It also referred to financial authorization for both direct labour (by BGIS) and subcontracts (including an environmental consultant). The total amount authorized was approximately \$4.43 million.

[78] As the applicant recognized, the Main Contract required a Work Authorization for the work to be done (section 4.1.3). The Main Contract also provided for the contents of a Work Authorization (sections 4.1.6 required a description of the services to be provided; section 4.2.2 required more additional details).

[79] Mr Gardner's affidavit confirmed that the document produced as document #9 to Ms Miller by PSPC in response to that request (DST Consulting Engineers's letter dated November 20, 2018) was in PSPC's possession. His affidavit initially stated that the report was in PSPC's possession "because it was required by a work authorization", which he corrected to remove the quoted words because the report was not specifically "required by" the work authorization. Mr Gardner did not clarify why document #9 was in PSPC's possession, but it is apparent on the evidence that the DST Consulting Engineers report letter is an updated designated substances report necessary prior to demolition of the Health Protection Building as contemplated by PSPC's work authorization discussed above. It is self-evident why, in all likelihood, PSPC possesses the updated designated substances report for one of its buildings.

[80] These subcontracting and work authorization provisions in the Main Contract and PSPC's physical possession of the November 20, 2018, updated designated substances report

further confirm that the solicitation process and the work done under the Subcontract between BGIS and DST Consulting Engineers was related to a departmental matter.

[81] Finally, the Main Contract expressly refers to designated substance reports, which are the main topic of the Request and which constitute two of the six documents (#3 to #8). See section 5.10.3.6 (which provides that BGIS must provide PSPC no later than sixty calendar days prior to the Contract Operational End Date copies of existing studies including designated substance reports).

[82] These factors amply demonstrate that documents #3 to #8 relate to a departmental (PSPC) matter.

(2) Step Two: Should a senior PSPC official reasonably expect to obtain a copy of the records upon request to BGIS?

(a) *Nature, creation and substantive content of the records*

[83] I have already described the nature of the documents in the Request, which are all related to an overall request for all “designated substances reports” related to the contract awarded to DST Consulting Engineers in April 2017 in connection with the demolition plans for the Health Protection Building. It is common ground that PSPC did not create documents #3 to #8 and that they were created by an entity that is not a “government institution” under the Act.

[84] Documents #3, 4, 7 and 8 are all documents related to what the parties termed “solicitation” documents: they are all related to BGIS’s process to award a subcontract under the

Main Contract. Specifically, documents 3 and 4 are “BID DOCUMENTS” and are “Addenda” with specific dates in March 2017. Document 7 is an RFP document (“Scope of Work”) and document 8 is DST Consulting Engineers’ “Completed Stipulated Bid Document”, “Appendix F Supplementary Conditions”.

[85] As already noted, two documents (#5 and #6) are under the heading “RFP DOCUMENTS” and described as designated substances reports. The Request suggests that BGIS used these designated substances reports in the solicitation process for the Subcontract awarded to DST Consulting Engineers. They must have existed prior to BGIS’s solicitation process for the Subcontract. As noted, DST Consulting Engineers’s letter dated November 20, 2018, lists five such reports for the Health Protection Building.

(b) *Legal Relationship between PSPC and the records holder BGIS*

[86] The Main Contract contains the legal foundation for BGIS to do work and to subcontract. The parties exchanged detailed submissions, both in writing and orally at the hearing, concerning whether specific terms in the Main Contract permitted PSPC to require BGIS to provide copies of the records mentioned in the Request. While a contractual right to obtain copies is obviously influential, it is not necessarily determinative of control under subsection 4(1). Nor is the existence of such a contractual right a condition precedent to a conclusion that the second step of *National Defence* has been met: see *YUDC v. Information and Privacy Commissioner*, at para 55. As the parties recognized, one cannot lose sight of the larger question to be answered: whether a senior PSPC official could (i.e, should reasonably be able to) obtain a copy of the records from BGIS.

[87] Several provisions of the Main Contract are particularly salient to the analysis at step two: section 2.5.7 (a general obligation to provide reports and information), sections 2.6 and 5.6.5 (concerning subcontracts) and section 2.44 (related to access to information requests). These provisions strongly support the position that a senior official at PSPC reasonably could expect to obtain copies of the requested records from BGIS. Indeed, when these provisions are read together and considered with the evidence of BGIS's assistance already, I conclude that PSPC should have little difficulty in obtaining copies of them from BGIS and in getting BGIS's assistance in identifying documents #5 and #6 that are likely in PSPC's hands.

[88] Section 2 of the Main Contract contains the General Conditions. Section 2.5 is entitled "Conduct of the Work". The "Work" under the section 2.1 means "all activities, services, goods, equipment, matters and things required to be done, delivered or performed by the Contractor [BGIS] under the [Main] Contract". Section 2.5 has eight subsections of broad and general obligations, such as (in summary):

- a) the Contractor's [BGIS's] representations and warranties that it is competent to perform the Work, has everything necessary to do it, and the necessary qualifications (section 2.5.1);
- b) requirements that the Contractor perform the work diligently and efficiently, perform the work to a quality acceptable to Canada and free from defects, and provide effective and efficient supervision over the quality of the workmanship to meet the requirements of the Main Contract (sections 2.5.2 and 2.5.4);

- c) access to property to perform the Work and to carry out the Work without delay (sections 2.5.5 and 2.5.6); and
- d) the Contractor is fully responsible for performing the Work (section 2.5.8).

[89] Section 2.5 also contains, in section 2.5.7, a general obligation on BGIS to provide reports required by the terms of the Main Contract and any other information that PSPC may reasonably require:

The Contractor must provide all reports that are required by the Contract and any other information that Canada may reasonably require from time to time.

[90] Mr Gardner testified that as soon as any other information is requested, it becomes a deliverable under the Main Agreement.

[91] The applicant argued that this provision concerns reports and information about the conduct and quality of the work done under the Main Contract, and that Mr Gardner testified in cross-examination that it relates to the standard of quality of the work done by BGIS.

[92] However, Mr Gardner characterized section 2.5.7 as a “very wide clause for sure”. He is correct. On its face, section 2.5.7 concerns reports and information about the conduct of the work generally (which is essentially the whole of the performance of the Main Contract) and is not limited to quality issues. While section 2.5.7 refers to required “reports” and “any other information” reasonably required, rather than “records” as used in the Act, the former terms together are relatively expansive.

[93] The contents of sections 2.6 and 5.6.5 have already been discussed. I emphasize here that these provisions contemplate subcontracts and, importantly, the use of a “competitive bidding” process for them: sections 5.6.5.3. Section 5.6.5.4 includes an express obligation on BGIS to “respond to any industry or Canada inquiries concerning the awarding of subcontracts and notify the Technical Authority of any unresolved inquiries”. While I recognize Mr Garder’s evidence about how this provision has been used in the past, there is no inherent restriction on the scope of the provision. It provides transparency and accountability to both industry and to PSPC for the subcontracting process.

[94] Best practices for the competitive bidding process are expressly included in sections 5.6.5.5 and 5.6.5.6. These practices include that BGIS “ensure its subcontracting processes are open, transparent and fair”, and that there is proper documentation including as to the selection criteria for subcontractors. Again, there is a contractual requirement to provide documentation to PSPC (the Technical Authority) upon request: section 5.6.5.

[95] Section 2.44 of the Main Contract, set out above in part, has three key components. It acknowledges that records created by BGIS that are “under the control” of PSPC, are subject to access to information requests. This provision must cover solicitation documents for subcontracts created by BGIS or used in the process (such as designated substance reports used to educate bidders for the subcontract work). In addition, section 2.44 is mandatory: it contemplates that BGIS “must, to the extent possible, assist” PSPC to discharge its responsibilities under the Act. Lastly, in section 2.44 the Contractor expressly acknowledges the offence in section 67.1 of the



Act related to the obstruction of the right of access in the Act and the possible punishments for it (imprisonment or a fine, or both).

[96] The provisions identified above in the Main Contract are not the only indications that if a senior official at PSPC were to ask for copies of the documents in the Request, BGIS would respond positively and provide them. BGIS has already shown its cooperation and assistance in relation to the Request.

[97] Mr Gardner's evidence described a call to BGIS in relation to Ms Miller's Request. His affidavit advised that he telephoned BGIS to ask about the subcontract in the Request and "was advised that the Subcontract was a contract between BGIS and a private sector contractor". He "concluded that PSPC was not a party to this contract". Mr Gardner's affidavit disclosed nothing else about this conversation, or any related communications (e.g., by email in advance or after the call). In cross-examination, Mr Gardner confirmed the name of the BGIS employee he called (Mr Taylor) and advised that the call was not recorded. Mr Gardner testified that, after searching his email and GCDOcs, he did not identify any correspondence in furtherance of responding to the access request including correspondence relating to the Main Contract.

[98] Mr Gardner's call to BGIS is relevant on its face to the Court's determination of whether a senior PSPC official could be expected to obtain a copy of the records by requesting them from BGIS. Consistent with section 2.44 of the Main Contract, it shows that in response to a call from PSPC, BGIS provided assistance with an access to information request to PSPC – and in relation

to Ms Miller's Request in particular. PSPC did not point to any evidence that BGIS has failed or declined to assist PSPC with any past request under the Act.

[99] I find it passing strange that no one from PSPC's ATIP Unit or Mr Gardner has asked BGIS to assist PSPC to identify the designated substance reports (documents #5 and #6) in Ms Miller's Request, which BGIS provided to DST Consulting Engineers and presumably other potential bidders during the subcontracting process. These reports are likely in the physical possession of PSPC and clearly relate to the Health Protection Building but, apparently, cannot be identified by anyone at PSPC owing to their description in the Request. They must be two of the five designated substance reports in PSPC's possession. It seems a simple thing to pick up the phone to get some assistance from BGIS, as Mr Gardner has done already, particularly in light of section 2.44 of the Main Contract and subsection 4(2.1) of the Act. A mechanistic, technical or overly literal approach to filings under the Act, such as the Request, serves not only to impede and delay the access to information process but to undermine the stated objective of the Act – to enhance the transparency and accountability of federal institutions: see subsection 2(1); *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, at para 2; *National Defence*, at para 15 (Charron J.) and paras 78, 80-82 (Lebel J. concurring); *Canada (Office of the Information Commissioner) v. Canada (Prime Minister)*, 2019 FCA 95, at para 34. Similarly, it serves no one well to suggest that Ms Miller could obtain copies of some of the documents in her Request by filing another request under the Act and waiting for PSPC's response to that fresh request at some unknown time in the future.

[100] The respondents' submissions relied on a provision in the Main Contract calling for an "environment of mutual respect and trust" between PSPC and BGIS, to support their position that a request for the records would be successful. The Main Contract also contemplates a requirement of "close business and operational ties" between PSPC and BGIS. While I agree that these provisions are relevant, I am not persuaded that they should have significant weight even if they do tend to support my overall conclusion in the present case.

[101] The respondents' submissions observed that during the Commissioner's investigation, PSPC advised by email on April 22, 2021, that the Main Contract "stipulates that PSPC can request documents of interest at any time". By further email later the same day, PSPC revised its position to say that the Main Contract "stipulates that PSPC can request documents of interest at any time to support legal obligations". The same two emails confirmed, on the specific topic of designated substance reports, that PSPC only asks BGIS for bid documents that belong to BGIS "if there is a legal court case and these documents are required".

[102] PSPC's two emails did not specify the pertinent provisions in the Main Contract that relied upon to obtain documents from BGIS. However, as the Commissioner observed, PSPC's position recognized that if there were litigation, PSPC would consider documents as required to defend itself to be obtainable from BGIS. While the applicant noted in reply that this is no longer its position and referred to third party production under the *Federal Courts Rules*, it is unclear how seeking documents in the litigation situation can be meaningfully distinguished from seeking documents that are in BGIS's possession and obtainable under the Main Contract when needed to answer a request under the Act.

[103] Relying on the good faith principles in *Wastech*, the applicant challenged the Commissioner's conclusion, in her final report, that PSPC has a "legally enforceable right of access" to the requested records. The applicant submitted that any attempt to use the provisions in the Main Contract for purposes other than those in the provisions themselves would constitute an abuse of discretion and a breach of the Main Contract. The applicant made specific submissions on the use of audit provisions in Clause 31 of the General Conditions, the subcontracting provisions in section 5.6.5 (particularly 5.6.5.4), and Clause 11 of the General Conditions (concerning necessary samples and documentation for PSPC to carry out an inspection and acceptance of the work).

[104] Good faith in contractual dealings is an organizing principle in the law of contracts: *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 SCR 494, at paras 63-66, 69-71; *Wastech*, at paras 58, 62-64, 128. The Supreme Court has recently discussed two existing doctrines as manifestations of the principle of good faith: the duty of honest performance of a contract and the duty to exercise a contractual discretion in good faith: *Bhasin*, at para 73; *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45, [2020] 3 SCR 908; *Wastech*, at paras 58, 62-63. For the latter, the question is: was the exercise of contractual discretion unconnected to the purpose for which the contract granted discretion? If so, the party has not exercised the contractual power in good faith: *Wastech*, at para 69. In other words, if the exercise of the discretionary power falls outside of the range of choices connected to its underlying purpose — outside the purpose as defined by the parties' agreement — it is contrary to the requirements of good faith: *Wastech*, at paras 71, 75. The duty to exercise a contractual discretion in good faith will be breached if the exercise of discretion is unreasonable, in the sense that it is unconnected to the purposes for which the discretion was

granted. This will occur if the exercise of discretion is capricious or arbitrary in light of those purposes because that exercise has fallen outside the range of behaviour contemplated by the parties: *Wastech*, at para 88.

[105] As is apparent, in this application there has been no actual exercise of any contractual discretion by PSPC and there is no allegation of an actual absence of good faith of any sort. BGIS is not a party to this application, and it is not appropriate to make definitive statements about the interpretation, or the purposes, of any specific terms in the Main Agreement without the benefit of evidence and submissions from both contracting parties.

[106] The applicant's argument is effectively that if PSPC were to use certain provisions in the Main Contract to seek to obtain the records in the Request from BGIS, PSPC would be constrained by contractual doctrine not to do so for a purpose unconnected to the purpose of the provisions. Quite to their credit, PSPC's counsel did not overextend the argument to provisions in the Main Contract that could not bear it. There remains a certain irony in PSPC's position on this application – if challenged by a counterparty in some future theoretical lawsuit, one would expect a robust argument about the expansive purposes of contractual provisions and the rare circumstances in which exercises of contractual discretion are unconnected with the purpose(s), in light of the larger bargain between the parties, so as to constitute a breach of the agreement. Indeed, PSPC's emails dated April 22, 2021, sent during the Commissioner's investigation, are consistent with that hearty approach.

[107] In my view, the principles in *Wastech* do not affect the necessary analysis at step two in this case. Assuming that the provisions contemplate the exercise of a “discretion”, a request by PSPC to BGIS for copies of documents #3 to #8 would not be unreasonable as described in *Wastech*, having regard to the purposes discernable from reading the text of section 2.5.7, section 2.44 and section 5.6.5.4 on their face and considering their context in the broader bargain between PSPC and BGIS in the Main Contract as a whole and (for section 2.44) in light of subsection 4(1) of the Act. It is not necessary to analyze the purposes of the audit provisions or the inspection provisions raised in the applicant’s submissions.

[108] For these reasons, I find that the second step in the *National Defence* test has been met for documents #3 to #8 in the Request.

(3) Conclusion on documents #3 to #8

[109] Applying the two-step analysis in *National Defence*, I conclude that a senior PSPC official reasonably should be likely to obtain copies from BGIS of the requested records #3 to #8. The *National Defence* test is made out and the resulting records must be disclosed, subject to any specific statutory exemption. In addition, I conclude that if PSPC were to ask, BGIS would also cooperate and assist PSPC to specifically identify the designated substance reports mentioned in the Request (documents #5 and #6) so they may be located in PSPC’s possession.

F. *Should the Court also order PSPC to retrieve document #9 from BGIS?*

[110] Ms Miller's Request asked for "DST Consulting Engineers Inc. SUBMITTED FINAL CONTRACT REPORT", "Final Investigate & Report (I&R) including lab analysis reports, photos, diagrams". In response, PSPC provided her with a copy of DST Consulting Engineers's letter dated November 20, 2018, which was in PSPC's possession. It is a "Designated Substances and Hazardous Materials Update Summary Report" for the Health Protection Building.

[111] Ms Miller submitted that the document produced to her was not in fact what she requested. The Commissioner supported her position. The applicant contended that it properly answered the Request concerning document #9 and that in the search of its records, PSPC did not find a document bearing the title set out for document #9 in the Request. The Commissioner's position was that PSPC did not conduct a reasonable search in response to the Request. The Commissioner argued, with justification, that PSPC's affidavit evidence about its searches was outside the deponent's personal knowledge and ran afoul of Rule 81 of the *Federal Courts Rules*.

[112] On these issues, the parties made detailed arguments on the evidence and absence of it, getting tangled up on inferences that could be drawn about whether PSPC's searches were satisfactory and ensnarled on whether the document provided to Ms Miller was responsive to the precise language used by Ms Miller to describe document #9 in her Request.

[113] To my mind, the knots in these submissions are not Gordian. Regardless, they can be cut with a simple solution, which is to ask for help. Section 2.44 of the Main Contract provides that

BGIS must, to the extent possible, assist PSPC in discharging its responsibilities under the Act. As with documents #5 and #6, it is hard to understand why PSPC has not asked BGIS for assistance – to provide a bit of information – to resolve whether the document PSPC provided is, in fact, the correct document. Is the document provided to Ms Miller the final contract report submitted by DST Consulting Engineers, or not? If no, it is then a simple matter to ask BGIS for the date and description of the final report, so that PSPC can conduct a search of its own records to determine whether it has a copy in its possession. Based on the evidence on this application about designated substance reports for the Health Protection Building, it would be surprising if PSPC did not have a copy of that final report in its possession.

[114] In the interests of resolving the issue raised by Ms Miller, I make the following additional conclusion in case the document produced to her as document #9 is not the actual final report she requested and PSPC does not have a copy of that report. I find that the nature of document #9 in the Request is a further and updated designated substances report for the Health Protection Building, like documents #5 and #6 and the five reports listed in the letter dated November 20, 2018. The two-step *National Defence* analysis above in relation to documents #3 to #8 also applies, in that document #9 relates to a PSPC departmental matter and a senior PSPC official would reasonably expect to receive a copy of the final contract report by DST Consulting Engineers if a request were made to BGIS.

#### G. *Remedy*

[115] The practical effect of these conclusions is to affirm substantially all of the Commissioner's order dated November 8, 2022. In the interests of clarity, the Court's Judgment



will set out the applicant's obligations to cause PSPC make certain requests to BGIS in accordance with these Reasons. Under paragraph 50.2(a) of the Act, the Court will order the applicant to cause PSPC to ask BGIS for copies of documents #3 to #8 in the Request and to seek information and assistance from BGIS concerning document #9, and if needed a copy of it.

[116] Two points arise from the Information Commissioner's order, which required PSPC to "retrieve" the records that the Commissioner concluded were "under the control" of PSPC "from BGIS (or DST Engineers Inc.)".

[117] None of the parties addressed the meaning of "retrieve" on this application. The applicant has not demonstrated that this aspect of the order should be set aside so it will remain extant.

[118] The applicant recognized that BGIS and DST Consulting Engineers were both likely record holders. However, the parties argued this application by asking the Court to determine whether the records in BGIS's physical possession were "under the control" of PSPC (other than documents #5 and #6 which, as the applicant acknowledged at the hearing, were expected also to be in PSPC's own possession). The parties did not turn much attention to whether records in the possession of DST Consulting Engineers were "under the control" of PSPC.

[119] I am satisfied that BGIS will have copies of all documents at issue in this application (#3 to #9), if they are not also in the possession of PSPC. Accordingly, no decision is required concerning whether records that may be in the possession of DST Consulting Engineers are under the control of PSPC under subsection 4(1) of the Act.

[120] The Court's Judgment under paragraph 50.2(a) of the Act will reflect that circumstance, and in practical terms will vary the remedy in the Commissioner's order slightly but importantly to refer only to requests for records in the possession of BGIS and not records in the possession of DST Consulting Engineers. In accordance with sections 50.3 and 50.4 of the Act, the Court's Judgment will rescind the phrase "(or DST Engineers Inc.)".

[121] In light of the passage of time since Ms Miller's request under the Act in July 2020, the Court's order will require that PSPC implement the Judgment promptly.

## **V. Conclusion**

[122] For these reasons, the applicant's request for a declaration will be dismissed.

[123] With respect to costs, subsection 53(1) of the Act provides that costs are in the discretion of the Court and shall follow the event unless the Court orders otherwise. The parties advised shortly after the hearing that they had agreed that, as between the Minister and the Information Commissioner, no costs should be awarded to the successful party. As between PSPC and Ms Miller, the parties agreed that the successful party should be awarded costs fixed in the amount of \$6,000.

[124] Applying the discretion and direction in subsection 53(1) and the power to fix costs under Rule 400, costs will be awarded to Ms Miller and fixed in accordance with those submissions.

[125] I turn to a costs award between the Information Commissioner and the applicant. As a successful respondent to the application, the Commissioner had filed evidence, participated in

cross-examinations, reviewed documents produced, filed written submissions and read the other parties' submissions, and prepared for and appeared at a day-long hearing of the application. Her substantive submissions provided valuable assistance to the Court. I have come to the same conclusion as the Commissioner did in her final report, with one slight variation. These factors, and subsection 53(1), point to a costs award in favour of the Commissioner. That said, the Minister and the Commissioner reached an agreement as to costs between them and did so without knowledge of the outcome of this application. While they did not explain why they agreed as they did, I believe their agreement warrants considerable weight in determining whether to make a costs award and in what quantum. In addition, PSPC filed a responsible application. While PSPC did not propose any change to the two-stage test in *National Defence*, the prior decided court cases do not squarely address how that test should apply to records created by and in the possession of a private sector contractor. Finally, neither party made submissions about whether some of the litigated issues should have been resolved before the hearing in this Court. In the circumstances, and accounting for both Parliament's direction in subsection 53(1) and the parties' agreement, I make no costs award for the Commissioner.

[126] As I did at the hearing, I would like to acknowledge and thank all the lawyers for the three parties for their helpful and detailed written and oral advocacy on this application.

**JUDGMENT in T-125-23**

**THIS COURT’S JUDGMENT is:**

1. The Court dismisses the applicant’s request for an order declaring that Public Services and Procurement Canada (“PSPC”) is not required to comply with the order of the Information Commissioner dated November 8, 2022.
2. The applicant shall comply with paragraph 1 of the order of the Information Commissioner of Canada dated November 8, 2022. To that end:
3. the applicant shall cause PSPC to request a copy of documents #3 to #8 in the access to information request of the respondent Marilyn Miller dated July 9, 2020 (the “Request”), from Brookfield Global Integrated Services Inc. (“BGIS”);
4. the applicant shall cause PSPC to seek information and assistance from BGIS and if necessary, to request a copy of document #9 in the Request, all in accordance with the Reasons for Judgment in this matter;
5. the applicant shall cause PSPC to comply with paragraph 2 of the order of the Information Commissioner of Canada dated November 8, 2022, and specifically, shall cause PSPC to respond further to the Request by processing the records in accordance with the *Access to Information Act*;
6. the applicant shall cause PSPC to implement paragraphs 2 and 3 of this Judgment promptly;

7. the phrase “(or DST Engineers Inc.)” is rescinded in the order of the Information Commissioner dated November 8, 2022;
8. the applicant shall pay costs to the respondent Miller in the amount of \$6,000.00, all-inclusive. There is no costs order as between the applicant and the Information Commissioner.

"Andrew D. Little"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-125-23

**STYLE OF CAUSE:** MINISTER OF PUBLIC WORKS AND  
PROCUREMENT v INFORMATION  
COMMISSIONER OF CANADA and MARILYN  
MILLER

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** APRIL 4, 2024

**REASONS FOR JUDGMENT  
AND JUDGMENT:** A.D. LITTLE J.

**DATED:** JUNE 17, 2024

**APPEARANCES:**

Jennifer Francis FOR THE APPLICANT  
Amanda McGarry

Patrick Levesque FOR THE INFORMATION COMMISSIONER OF  
Rachelle Nadeau CANADA

Andrew Astritis FOR MARILYN MILLER  
Emily McBain-Ashfield

**SOLICITORS OF RECORD:**

Attorney General of Canada FOR THE APPLICANT

Office of the Information FOR THE RESPONDENT, INFORMATION  
Commissioner of Canada COMMISSIONER OF CANADA

Ravenlaw LLP FOR THE RESPONDENT, MARILYN MILLER